

Case Law Spotlight

Cala Management Limited v Messrs A&E Sorrie [2009] CSOH 79, 2 June 2009.

The defenders (A&E Sorrie partnership) are the heritable proprietors of three plots of land in Inverurie. In 2002, they entered into missives with Cala with a view to granting an option over two of those areas of land. If the option was exercised within a five year period, Cala were to pay the defenders 87.5% of the open market value. Cala then entered into further missives for the purchase of a third plot of land for £1.25m, payable within 28 days of planning permission and any other necessary consent having been obtained, the option having by then been exercised. There was a clause in both missives which clearly made Cala responsible for progressing the planning application which underlay the property deal, and for all expenses associated with it. There was also a clause requiring the defenders to sign any agreement with the local authority as a pre-requisite to planning permission being granted by Cala upon a reasonable request for them to do so. An application for planning permission was duly lodged by Cala with Aberdeenshire Council which decided it was minded to grant subject to a s 75 agreement being signed. The defenders required to be signatories to the s 75 agreement on account of being the owners of the land in question but they refused to do so when requested by Cala. Cala therefore brought an action before the Court of Session seeking a formal court declaration that the defenders were obliged in terms of the missives contract to sign the s 75 agreement. The pursuers argued before the commercial judge that it was the request to sign that required to be reasonable, rather than the terms of the s 75 agreement itself. The judge disagreed holding that the term “reasonable” had been inserted into the missives in order to protect the interests of the defenders and the contract required to be interpreted in that way. In particular, the s 75 agreement required various contributions of capital sums from the “proprietors” (i.e. the defenders) amounting to millions of pounds in planning gain. Since they had no control over the planning application, it was a tangible and real possibility that they would in effect be required to sign a “blank check” and at the mercy of the what Cala had agreed with the planning authority. Accordingly, the Court held that such a request, once the terms of the s 75 agreement had been finalised, was not “reasonable” in the terms of the contract between the parties. He also found that the planning application and s 75 agreement covered both the option land and the purchase land, so that the defenders

were in each case being asked to sign a contract in relation to land which was different to that which was covered by the missives. The defenders could not have been able to foresee the final terms of the s 75 agreement when they concluded missives, and it was the pursuers who elected to pursue the planning application in respect of all three sites, rather than have them reflect the terms of the missives. Cala's action was therefore found to be legally irrelevant and the defenders were not bound to sign the agreement with the local authority. The interesting point about the dispute is that, it is accepted practice that it is the *developer* (in this case Cala) that are required to make contributions to infrastructure following upon a development being granted planning permission. No doubt, that was the intention in this case, but due to the timing of the transfer of land, in legal terms, the defenders might well have found themselves carrying the can for all that had been agreed with the Council by way of community and infrastructure improvements at the hand of Cala. The whole situation could have been neatly avoided by means of producing a separate indemnity agreement between the parties whereby the defenders would have been able to offset their liabilities in terms of the s 75 agreement to Cala. If that step had been taken, it would have done nothing more than reflect established practice and would have avoided an unnecessary court battle in the process.

Maurice O'Carroll, Advocate, LARTPI

www.mauriceocarroll.co.uk